INTERNATIONAL JOURNAL FOR BUSINESS LAW STUDIES

Volume I
Issue II

DECODING INVESTOR-STATE DISPUTE SETTLEMENT THROUGH THE LENS OF BIT

Vaishnavi Patel[1], Priya Maharishi [2]

Abstract

There has been an increase in Investor-State Dispute Settlement claims against India due to its retrospective tax amendment of 2012 which allegedly violates its obligations under Bilateral Investment Treaties (BIT). BIT, with an objective of protection and promotion of foreign investment, fails in balancing the rights of the foreign investor and the regulatory discretion of the host state. BIT clauses are interpreted in a pro-investor manner by the arbitral tribunal in an investor-state dispute.

The paper aims at examining pro-investor interpretation of 'fair and equitable treatment' clauses present in BIT under Investor-State Dispute Settlement (ISDS). It considers the issue of imbalance in the investor's rights and the host state's regulatory discretion when exercised for the national interest. India's BIT Model 2016 focusing on balancing the two, ended up being 'pro-state'. Therefore, this paper provides recommendations for public arbitral awards, adoption of a mutually beneficial approach rather than a defensive approach by India, including interpretative guidance in the treaty and adopting a process of mediation settlement converted to an arbitral award approach for ISDS.

Keywords: Investor, Dispute, Bilateral Investment Treaty, ISDS, Mediation

---

[1] Gujarat National Law University
Email: vaishnavi.j399@gmail.com
[2] Jindal Global Law School
Email: priyamaharishi1@gmail.com

Introduction

India has been held in violation of the India-UK Bilateral Investment Treaty, 1994 and international law by the Permanent Court of Arbitration, Hague in December 2020 against Cairn Energy Plc. and Cairn UK Holdings Ltd. for its infamous retrospective tax amendment of 2012 which was implemented after the Vodafone tax dispute[3].[4] Bilateral Investment Treaties ("**BIT**"), which secures a slew of rights to the foreign investor investing in the host state, has recently been in the spotlight.

The reason for the same being increase in Investor-State Dispute Settlement ("**ISDS**") by the investors for violation of host state's obligation under the BIT. Additionally, under ISDS, there have been inconsistencies in the definition of 'Fair and equitable treatment' ("**FET**") provisions under various BIT, which has created uncertainty in determining the sovereign regulatory discretion of the host state.

Furthermore, ISDS is more in favour of investment promotion and fails to balance the rights of the foreign investor and the regulatory discretion of the host state. The India BIT Model, 2016, though aims to strike that balance, it is more favoured towards protecting the discretion of the host state.

The paper aims to explore the conflicts arising in determining the sovereign right of regulatory discretion of the host state which is curbed through restrictive interpretation of FET under ISDS and favouring investor protection over the exercise of host state discretion in the national interest.

Hence, to promote the long-term relations between the foreign investor and the host state, this paper recommends transparency, stability, the inclusion of interpretative guidance in treaty texts and converted arbitral awards from mediation between the investor and the host state are made.

[3] *Vodafone International Holdings BV* v. *India (I)*, PCA Case No. 2016-35

[4] *Cairn Energy PLC* v. *Union of India*, PCA Case No. 2016-7

Literature Review

1. **Gallus (2005)** explained that during the implementation of the FET standard, host state characteristics are one thing to be taken into account for ensuring an appropriate balance between investor and host state's interests. The substance of the standard should be tailored to the degree of development of the host state that has not been widely acknowledged by tribunals.

2. **Ranjan (2008)** noted that a key feature of International Investment Arbitrations is that they limit the signatory countries' regulatory discretion by establishing requirements that prohibit specific forms of behaviour. He, therefore, analysed that the signing countries are required to exercise regulatory discretion in accordance with the IIA's requirements.

3. **Ranjan (2010)** attempted to examine Indian Investment Treaty Programme from the perspective of global experiences. A key issue highlighted by him was that India must expand its BIT Programme since BITS possess the the capability of unduly restraining the host country's regulatory discretion. Another important observation made by him was that the regulations relating to foreign investments do not refer to the obligation laid down under the BIT.

4. **Dhar, Joseph & James (2012)** analysed the assertion that provisions in India's Bilateral Investment Promotion and Protection Agreements that have helped foreign investors win claims before international arbitration tribunals. The authors placed emphasis on a review of India's BIPAS to ensure consistency in provisions across all such agreements in the national interest, warning that these disputes with foreign investors signal the arising and emerging struggle between foreign investors and sovereign states in the lightface of wavering uncertain economic prospects in the nations of the post-crisis world.

5. **Osterwalder (2014)** provided suggestions for how the state–state dispute settlement could be utilized as an alternative to investor-state arbitration, or, if both mechanisms are used, how to define their relationship and increase state parties' influence over treaty interpretation.

6. **Ranjan & Anand (2017)** critically analysed the BIT Model of 2016. The authors noted that it attempted to reconcile the clash between the interest of the foreign investor and the host state. However, India has failed to do so due to a very narrow definition of investment and provides for a narrow FET situation and excludes tax regulations and MFN from the ambit of BIT.

7. **Wang (2017)** analysed the deficiencies of investment dispute resolutions. They include and are not limited to time-consuming procedure high costs and enforcement of awards. The author explained a lack of coordination and the consequent multiplicity of awards to be the chief reasons for the issue of the operation of award. The mode of arbitral proceedings also retains the traditional characteristics of commercial arbitration such as confidentiality and lack of transparency.

8. **Mach (2018)** explained that the doctrine of legitimate expectation is currently a sub-set of the FET standard, albeit the nature of the standard and its precise meaning are still debated and vary depending on the BIT's wording and the makeup of the individual tribunal.

The tale of the much popular Vodafone tax case began in 2007 when the tax authorities in India alleged that the firm hadn't deducted tax at source from its Hutchison deal. Upon challenging the notice before the Apex Court, it was held that Vodafone International Holdings BV ("**VIHBV**") had not acted in violation of the Income Tax Act.

The Supreme Court ruled that the selling of the stake to Vodafone by Hutchinson did not constitute a 'capital asset' transfer under Section 2(14) of the Income Tax Act. It not only quashed the demand for INR 120 billion in capital gains tax but also ordered a refund of INR 25 billion deposited by Vodafone per an interim order dated November 26, 2010, as well as interest at 4% per annum, within two months. Following the above decision, the Indian Parliament passed the Finance Act 2012[5], which included provisions for the addition of two explanations to Section 9(1)(i) of the Income Tax Act[6]. The Amendment Act made any benefit on the transfer of shares in a non-Indian company that derives significant value from underlying Indian properties, taxable retrospectively.

[5] Finance Act 2002
[6] Income Tax Act 1961

VIHBV, by the imposition of tax as a result of a retrospective amendment to Indian tax legislation, filed a notice of dispute under India-Netherlands BIT on April 17, 2012. As a result of the notice, on September 25, 2020, an international arbitral Tribunal headed by F. Berman issued an award in favour of Vodafone International, citing a breach under India-Netherlands BIT's FET standard. The Tribunal ordered India to reimburse Vodafone for legal expenses in the sum of Rupees 850 million.[7]

The recent Cairn Energy arbitration case finds its origins in the 2012 Amendment[8]. Cairn UK had transferred shares of Cairn India Holdings to Cairn India as part of an internal reorganization process in 2006-2007. Cairn UK was then ordered to pay capital gains tax of up to Rs 24,500 crore by income tax authorities because it had made capital gains. Cairn Energy filed an international arbitration complaint against the Indian government's steps on March 10, 2015, under the India-UK BIT.

The Permanent Court of Arbitration ("**PCA**") held that the tax demanded against Cairn Energy Plc. and Cairn UK Holdings Limited for the fiscal year 2007-08 violated the treaty, and they were relieved of any duty to pay it. It asked the Indian government to neutralize the demand's continuing impact by permanently removing it. The Indian government was ordered to pay approximately Rs. 8000 crores to Cairn in the form of damages for violating the treaty.

1

---

[7] *Supra* note 1
[8] Amendments brought in by the Finance Act, 2012

Apprehending BIT and ISDS.

The relationship between the host state and the investors have been governed by bilateral treaties, due to the lack of a multilateral investment agreement. BIT or Bilateral Investment Protection Agreement ("**BIPA**")[9] are treaties entered into by two countries for the protection of investments made by the investors belonging to the two countries.[10] It is a formal, legally binding agreement among the contracting states to include equal treatment, security, preferential treatment or most favoured nation treatment, contract compliance, and an inbuilt dispute resolution mechanism.

The treaty protects and promotes the investments by enforcing compliance of conditions as provided under the treaty on the regulatory actions of the host state and preventing them from impeding the rights of the foreign investors. Such conditions consist of 'expropriation' by the host state, treatment of foreign investors per the principle of FET. BIT aims to create a favourable environment that encourages mutual investment in the territory of each contracting state. Mutual assurance of this kind is advantageous to the countries involved because it stimulates business initiatives and thereby increases their economic prosperity. In current times, BIPA is the most relevant source for international investment law.[11]

The BIPA contains elements and assurances that will serve as a legal foundation for upholding investor rights in the countries concerned.[12] BIPA provides for ISDS as a redressal mechanism. ISDS gives rights to an individual investor to raise investment disputes against the host state for its sovereign regulations which breach the host state's obligations under the respective BIT. To avail remedies under BIT, individual investors do not need to exhaust the remedies available under the domestic law of the host state. Often, ISDS clauses provide for international arbitration to settle disputes by the individual investor and the host state. This ensures that the host state is held accountable for its unjust exercise of sovereign powers by an independent body which is an international arbitral tribunal. Therefore, for settling investment disputes of such sorts, the dispute is shifted to a state-versus-investor dispute in ISDS from the typical state-versus-state dispute settlement, which usually are limited to interpretation and application of the treaty.[13]

---

[9] In the article, BIT and BIPA are used interchangeably
[10] Prabhash Ranjan, *India and Bilateral Investment Treaties* (1st edn, Oxford University Press 2019)
[11] Dolzer and Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2008)
[12] *Supra* note 3
[13] Nathalie Bernasconi-Osterwalder, 'State–State Dispute Settlement in Investment Treaties' (2014) IISD 1

In other words, the dispute is between the contracting party namely the host state and a third party, rather than a dispute between the contracting states. The rule of law and stability play a vital role in the investment climate of a country. During the assessment of a country's legal framework by a foreign investor, protection of investment and facilitation of particular ventures indicate the maturity of the investment climate of the country. In this context, the presence of a BIPA between the host country and the investor's country safeguards the investment of the foreign investor and facilitates a particular venture.

Nevertheless, when a dispute arises between the investor and the host state under the BIT under ISDS as arbitration, the regulatory discretion of the host state is determined through standards present under BIT, one such being FET.[14] The interpretation of FET is subjected to facts and circumstances of each case, which introduces uncertainty to the rights of the host state.

The Issue Surrounding The "Fair And Equitable" Standard.

The principle of FET is an absolute safeguard for the foreign investor. The initial objective and objective of FET clauses in BIT was to guard against a variety of instances in which unfairness could present itself, such as arbitrary license cancellations, harassment of an investor through unreasonable fines, etc.[15] Many arbitral rulings have construed the FET concept broadly, particularly in circumstances involving the investor's legitimate expectations resulting into an open-ended approach.

Normally tribunals support their decisions by referring to their precedents and do not take into account a different interpretation of the treaty language. Additionally, due to the absence of a clear legal test, the provision is prone to wide interpretation and unpredictability. As a result of its ambitious nature, the legitimacy of this principle is also time and again doubted by the host states.[16]

---

[14] Prabhash Ranjan, 'International Investment Agreements and Regulatory Discretion: A Study of India' 9 (2008) JWIT 209
[15] *Supra* note 4
[16] Daniel Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration* (Luxembourg Legal Studies 2015)

When implementing the FET standard, host state characteristics are one thing to consider in ensuring an appropriate balance between investor and host state's interests. The substance of the standard should be tailored to the degree of development of the host state that has not been widely acknowledged by tribunals.[17] Therefore, it is vital to draw a line between true abuse of foreign investments, which the FET standard should prohibit, and measures adopted by sovereign state in pursuit of legitimate policies, which cannot be considered in violation of the standard, even if they affect foreign investor's interests.

Claims for violation of legitimate expectations arise when an investor state is negatively impacted as a result of changes brought about by the host state's policies. In *Tecmed v. Mexico*[18], it was held that the host state's authorities were expected to consistently, without ambiguity, and transparently, ensure that the investor was aware of the regulatory and administrative rules and practices to which it would be subjected beforehand so that they could comply with. Similarly, in *Occidental v. Ecuador*[19], the Tribunal associated the international law criterion with the demand of a secure, predictable legal and business framework for investment.

On that account, it can be understood that the arbitral tribunals have gone so far as to hold that any adverse change in the host state's economic or legal system may constitute a breach of the FET criterion in terms of the investors' legitimate expectations irrespective of the host state's national policy. This approach is unjustified since it could preclude the host state from implementing any reasonable regulatory change, much less a regulatory reform that may be required as per the nation's policies. It ignores the reality that, as part of the normal operation of the legal and policy processes of the economy in which they operate, investors should expect regulations to change over time.[20]

The award by the Tribunal in the case of *Parkerings-Compagniet v. Lithuania*[21] is relevant to be cited for alterations in the regulations. The Tribunal determined that each State had an undeniable right to reasonably utilize its sovereign legislative power and that an investor must plan for a probable change of circumstances and legal structure.

[17] Nick Gallus, 'The influence of the host State's level of development on international investment treaty standards of protection' 6 (2005) JWIT 711
[18] ICSID Case No ARB (AF)/00/2, Award, 29 May 2003
[19] LCIA Case No. UN 3467, Award, 1 July 2004
[20] Tomas Mach, 'Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims' 1 (2018) ELTE LJ 105
[21] ICSID Case No. ARB/05/8

The FET claim was dismissed by the Tribunal, which found that the Republic of Lithuania had made no explicit or implied promise that the investment's legal framework would remain unchanged. Similarly, the view in *EDF v. Romania*,[22] was that if articulated in an unduly broad and unqualified manner, the notion that legitimate expectations, could mean to be the legal and business framework's stability, there may be conflicts in interpretation. FET could act as a virtual freeze in contract to the evolutionary nature of economic activity. the Tribunal noted that a bilateral investment treaty cannot be used as a form of insurance policy against the risk of changes in the host state's legal and economic framework unless the state makes specific assurances to the investor.

It is worth noting that the investor's FET standard is enshrined in the clause that ensures 'national treatment' and 'most favoured nation treatment' to investments in the host state. This choice could mean that the FET is applied to all investors from the source country, or that the test is applied to each investor. To demonstrate in the context of the India-Netherlands BIT, the FET criteria may be triggered just when Indian law discriminates against Dutch investors as a group in comparison to non-Dutch investors, or it may even extend to an evaluation of each Dutch-investors. Most tax regulations are indifferent to individual parties and often apply to a group of people, therefore this issue becomes more important. As a result, the FET's scope becomes critical. In the absence of the PCA's entire decision for the Vodafone tax dispute, it's difficult to say whether India used this argument to argue that the validation statute special to Vodafone Netherlands , but for non-residence could not be examined by the Tribunal.

India's position on the scope of investment treaties has been amended, and it now expressly rejects such investors' arguments about its tax policy and law. Undisputedly, every nation has a sovereign right to decide its tax policy. It has issued a revised BIT model and has terminated several investment treaties that are not per the new BIT model. It is no surprise that the 'fairness and equitable criteria' has been removed from the updated model, which now only protects against a limited set of instances mentioned in the treaty, as opposed to the previous *carte blanche* approach.[23] The 'fairness and equitable norm' appears to have been replaced with a measure that ensures procedural fairness, exemplifying India's position that the Tribunal cannot review substantive tax policy from a 'due process' standpoint.

[22] ICSID Case No. ARB/05/13
[23] Model Text for the Indian Bilateral Investment Treaty
Available at https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf accessed 23 May 2021.

Balancing Investor's Right and Regulatory Discretion of The Host State.

The treaties are interpreted in the perspective of promotion and protection of investments which suggests an interpretation in favour of the foreign investor. India was a party to multiple BIPA which contained a preamble stating the desire for creating beneficial conditions to increase the investment inflows and protection for the same for encouragement to individual business and greater economic prosperity.[24] It is based on the principle that the investments by the foreign investor should be protected from the arbitrary and discriminatory exercise of regulatory discretion by the host state.[25]

Therefore, BIT does not focus on "balancing the rights of investors with the regulatory discretion of host nations".[26] Notwithstanding the relationship between the regulatory framework and foreign investments in the host state, it is mandatory for the host state to exercise its regulatory discretion for implementing the national policies which may compromise the protection provided to the foreign investment under the BIT. Henceforth, the main issue arises when the investment suffers damages due to genuine regulatory discretion exercised by the host state for national policies.

This concerns the question of will the host state be liable for compensating for the damages caused to the investment of the investor.[27] The issue is further intensified when the host state is a developing country. It is admitted that there is material contribution of the foreign investors in the progress of the developing country's economy. Hence, the inventor's interests need to be protected. However, with increase in protection of investments, the developing host states policy goals are crippled if they are incompatible with the investments.[28] Additionally, there is high bargaining power imbalance when a BIT is negotiated between a developed country and a developing country.

[24] BIT Model India 2003
[25] Prabhash Ranjan, 'Indian Investment treaty Programme in the Light of Global Experiences' (2010) 25 EPW 68, 70
[26] Ibid
[27] Supra 25.
[28] Doug Jones, 'Investor-State Arbitration in Times of Crises' (2013) 25 NLSI REV. 27, 56

Hence, there is an asymmetry in ISDS as there is only protection of investor's interest and the host state is in a disadvantageous position, which is considered unfair to the host state. The overall aim of the BIT of protection of investments gets overrides the sovereignty of the host state and its genuine interest. There is an on-going struggle between the host state and the investor in the economic space. The regulatory framework gets scrutinized from the perspective of the BIT framework by the arbitral tribunal when it materially affects the investments made by the foreign investor even if it is implemented for national interest.

As the respective BIPA takes a "pro-investor"[29] approach, the ISDS mirrors the same. This is portrayed in different forms from the commencement of the arbitration. The consent for arbitration by the sovereign state is implied from when it signs BIT.[30] However, the arbitration can only commence with the investor's consent.[31] Therefore, the investor will only initiate the arbitration when it considers it to be in its interest. Additionally, the investor can resort to arbitration without exhausting the remedies provided to it under the domestic law of the host state as provided under the International Centre for Settlement of Investment Disputes ("**ICSID**").

It considers the circumstances where the foreign investor will be hesitant of the impartiality of the local judicial authorities in resolving the disputes between them and the host state. From another lens, the ISDS can be considered as the cessation of the host state's sovereignty as the investments in the host state's territory would not be brought before the local judicial authorities.[32]

The investor also has the liberty to decide the seat of arbitration and as per the arbitration rules of ICSID, the award can be brought under judicial review only where the arbitration was held. And certain jurisdictions have a less stringent judicial review for foreign awards. Therefore, the investor can choose to have such jurisdiction as a seat for arbitration. Indeed, ISDS is an attractive route for the investors to purse the dispute independently, without the reliance on the host state or its judicial authorities for the violation of BIT.[33]

---

[29] Biswajit Dhar, Reji Joseph and TC James, 'India's Bilateral Investment Agreements: Time to Review' (2012) 47 EPW 113, 118
[30] Kate M. Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 59 Duke L.J. 343, 352
[31] Ibid
[32] Julien Chaisse, 'Both Possible and Improbable- Could COVID-19 Measures Give Rise to Investor-State Disputes?' (2020) 13 CAAJ 99
[33] Juline Chaisee and Rahul Donde, 'The State of Investor-State Arbitration: A Reality Check of the Issues, Trends, and Directions in Asia-Pacific' 1 (2018) The International Lawyer 51.

Moreover, the profit of the investor gets pitted against the regulatory discretion exercised in the national interest by the host state. The implementation of the regulatory framework of the host state is independent of its international obligations under BIT. For example, the Press Notes lay down the regulatory framework concerning the foreign investments in India and are implemented irrespective of the obligations under BIT. Thus, the domestic regulatory framework by the host state and the regulations under BIT evolve independently and often result in contradicting each other.[34]

The same is not the case under the WTO obligations and its intersection with the domestic laws of the members and their coherent nature. The reason for the difference of treatment for multilateral agreements and bilateral agreements is that in the latter the obligation is limited to the another contracting party and not multiple member states. It is observed that Press Note 2012 regulating foreign investments do not address the BIT obligations. Therefore, when it comes to ISDS, domestic law is not a defence for violating international obligations which is a fundamental principle of international law.

It is the sovereign right of the host state to exercise its regulatory power for the national interest. But, when the same violates the obligations under the BIT, the sovereign right is looked at from the lens of BIT instead of policy under national interest.[35] This brings the regulatory framework provided by the host state under the preview of the international investment framework ("**BIT framework**"). It focuses on the protection of the investments by the investor. Under numerous cases, the arbitral tribunal has passed an award in favour of protection of the investment even if the regulatory discretion has been exercised in national interest or protection of the nation's economy.

In *CMS v. Argentina*[36] , Argentina adopted a plan for recovery from the economic crisis of the late 1980s and adopted policies that affected the investment made by CMS Gas Transmission Company (CMS). The Tribunal disregarded Argentina's argument regarding the 'necessity and emergency defences' and ruled that as the main principle of the BIT was the protection of Investment as per US-Argentina BIT promising "stable framework for investments and maximum effective use of economic resources" which was an essential element of FET.

[34] *Supra* note 25
[35] Ibid
[36] ICSID Case No. ARB/01/8

Therefore, the measure of change in regulations by Argentina due to a national crisis was a breach of its obligation of providing a stable framework of investment under the BIT. Argentina had to compensate US$133.2 million for damages to CMS. The win of the investors against Argentina in the arbitration proceedings prompted other investors to resolve their disputes with the relevant host countries to the international arbitral tribunal.[37]

While, in *Occidental Exploration Corporation v. Ecuador*[38], Ecuador passed a resolution on stopping the applications for VAT refunds by Occidental and required a return of the amounts reimbursed. The Tribunal held that the FET requires a stable framework for investment which needs to meet the criteria of 'stability and predictability'. The standard for FET is objective and independent of the *bona fide* intention of the host state. The investment was materially affected [39]and therefore Ecuador was in breach of its obligation under BIT.

In Total *S.A. v. Argentine Republic*[40] Argentina retroactively imposed export taxes on exports of Tierra del Fuego and eliminated exemptions on taxes on exports from Tierra del Fuego as Emergency Law. The Tribunal held that such an obligation was in breach of FET. In the case of *Continental Casualty v. Argentina*, the Tribunal allowed for the 'defence of necessity' as Argentina enacted 'Public Emergency Law' to cope with economic, financial, exchange, social and administrative crisis as "powerful evidence of its gravity such as that could not be addressed by ordinary measures".

Hence from the above case laws, it can be concluded that the foreign investors acting in a private capacity, rely on broad provisions such as the FET provision for ISDS to challenge the host state discretionary powers which are exercised in the national interest for claiming the damages. The impact of the discretionary power is analysed through the perspective of FET provision for any material damage caused to the investment by the foreign investor. Additionally, when the defence of necessity is invoked by the host state, the 'burden of proof' has a high and grievous threshold, allowing it only in 'strenuous circumstances'. The critique of policy space with reference to FET should be analyzed from the lens of global justice.[41]

---

[37] Guiguo Wang, 'The Belt and Road Initiative in quest for a dispute resolution mechanism' (2017) 25 APLR 1
[38] *Supra* note 18
[39] ICSID Case No. ARB/03/9
[40] ICSID Case No. ARB/04/01
[41] Xu Qian, 'Rethinking Judicial Discretion in International Adjudication: A Critical Roadmap to Promote Judicial Independence and Judicial Deference in Investor-State Arbitration' (2020) 21 UC Davis Business Law Journal 1,15

The perspective of global justice considers understanding the effect of the host state's policy on the real-world and distributive justice considering the sovereign right of regulatory discretion not being obstructed by provisions of FET in BIT. There is a need for the FET to become certain against the relative nature of distributive justice and interest of the investors.[42] Therefore, to balance the protection of the investment and regulatory discretion of the host state, India formed BIT model 2016 which is a product of India's assessment on BIT and ISDS.

The BIT model of 2016 aimed at providing "appropriate protection to foreign investors in India while maintaining a balance between investor's right and government's obligation."[43] The provisions of BIT Model 2016 was more precise than the Indian BIT Model of 2003. Currently, India has terminated the existing BIT with several countries and is in the process of negotiating for a new BIT based on the BIT Model 2016.

The BIT Model 2016 tries to reconcile the clash between the interest of the foreign investor and the host state. However, India has failed to do so due to a very narrow definition of investment and provides for a narrow FET situation and excludes tax regulations and MFN from the ambit of BIT.[44] It also restricts the jurisdiction of the tribunal under ISDS provisions as well as imposing the requirement of exhausting local remedies, if available, by the investor. Thus, the recent Model is pro-state and provides very limited rights to foreign investors. It could be understood to be for the protection of India from the claim by foreign investors such as Cairn Energy and Vodafone and financial implications resulting from proceedings against such investors.

[42] Ibid
[43] BIT Model India, 2016
[44] Prabhash Ranjan and Pushkar Anand, 'The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction' (2017) 38 NW. J. INT'L L. & BUS 1, 52

Recommendations

Keeping in mind the aforementioned conflicts, for resolving issues arising out of confidentiality of arbitral awards, arbitral awards could be made public after redacting any commercially sensitive material or anything that could reveal or jeopardize an investor's or host state's interests. An example of it would be the Singapore International Arbitration Centre (SIAC) Rules[45] which provides for the publication of limited information concerning a dispute such as the date of initiation, whether proceedings are pending, and the parties' nationalities). Only in extraordinary instances, such as during challenge or enforcement procedures or for interim reliefs, parties may divulge sensitive redacted information.

Greater transparency in this manner will enhance international arbitration by increasing arbitrators' responsibility and assisting in the formation of jurisprudence on specific legal issues. This can be achieved by compulsory partial or full publication of the proceedings and the award. The recent ICC Rules[46] of arbitration on the conduct of the arbitration endeavors to provide these documents though AI based technology. As per the Rules, Only the information and names that are absolutely necessary and pre-approved are made public.

The names, contact information of arbitrators, as well as the names, locations of the law firms representing the parties are not redacted. The relevant documents are then published on the ICC website for public access. If arbitral awards authored are available to the public, parties may be able to save significant time and money.

To advance the growth of international arbitration, legislators, arbitrators, and parties must align the two concepts of accountability and transparency. The paper has discussed in detail the lack of clarity with reference to the FET. The arbitral tribunal has been criticised widely for its broad and arbitrary discretion. Therefore, for clarification of the intent of the contracting parties, certain interpretative guidelines should be included in BIT.[47]

---

[45] Singapore Internal Arbitration Centre (SIAC) Rules (2016)
[46] Note to parties and arbitral tribunals on the conduct of the Arbitration under the ICC Rules of Arbitration
[47] Guiguo Wang, 'The Belt and Road Initiative in quest for a dispute resolution mechanism' (2017) 25 APLR 1

Additionally, a clear and precise drafting of the BIT is helpful in determining the obligations and the rights with reference to sovereign right of exercising regulatory discretion by the host state. This saves the investor from the anxiety caused by the uncertainty, enabling informed investments. India's decision to adopt the 2016 Model BIT must be lauded, especially in light of the ongoing discussion over how to reconcile investment protection with the host state's authority to regulate. However, the Model BIT might be interpreted as being pro-state and giving foreign investors restricted rights.[48] Two aspects must be kept in mind as the Indian BIT practice evolves. Firstly, to encourage international investment, BIT have played a significant role. Unnecessary regulatory intervention could create a climate of uncertainty for international investors.[49]

Those nations that are major capital exporters to India will be uninterested in a "pro-state" BIT with little protection for foreign investment. Secondly, the increased regulatory power of the host state could weaken the protection afforded to Indian enterprises operating abroad. Rather than adopting an inward-looking, protectionist, or defensive approach to BIT, India's BIT practice must evolve in a way that balances the interests of international investors without jeopardizing India's regulatory authority. This will benefit India's interests as both a capital importer and a capital exporter. Additionally, the choice of the model BIT to terminate several BIT could be described as a response to a perceived problem. India's current policy risks providing insufficient legal protection to its own citizens' international investments and may even discourage Foreign Direct Investment. The periodic changes to the US investment treaties and model BIT were designed to find a balance between deterring arbitral claims against the US and preserving foreign investors' assets. While it is debatable whether the US struck the right balance, the adaptations arguably demonstrate that, rather than gutting the treaties entirely, significant improvements can be made to reduce litigation risk by making more subtle changes to the treaty text and including interpretive guidance in annexes. The same could be exercised by India.

Furthermore, Investor-state arbitration is infamously volatile because BIT is a relatively new concept for promoting foreign direct investment. The arbitration proceedings do not bind future arbitration proceedings but are relied upon for interpreting similar treaty provisions. There is also the question for a third party determining the rights of the host state and the investor where the matter is considered through the perspective of hostility.

---

[48] *Supra* note 43

[49] *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1

Thus, by considering the limitations of the ISDS through arbitration, it is suggested that a more practical alternative would be Investor-State mediation. The process of mediation allows the parties to maintain cordial relations and holistically encourages accommodation. The process is voluntary[50], rather than only acknowledging the consent of the investor in addition to the parties being able to dictate the outcome of the dispute.[51] When it comes to redressal mechanisms, the foreign investor has the option for arbitration, conciliation, fact-finding, or negotiation with the host state.[52] ISDS lacks a process that is interest-based and structured. Mediation can provide the same to ISDS, where the mediator can focus on the interest and form long-term relationships between the investor and the host state by providing a facilitative approach. Nevertheless, the issue which arises when it comes to mediation is enforceability. A solution for this issue could be to convert the mediated settlement to an arbitral award upon the basis of terms of settlement agreed by the parties. The host state generally resorts to invoking the defence of sovereign powers to block the enforcement of arbitral awards.[53] However, when the award is mutually beneficial to the investor and the host state, both parties have the willingness to enforce the award. Therefore, with increased dissatisfaction with the ISDS through arbitration, mediation can bring a more amicable solutions to the table. There is a need for suitable infrastructure to promote mediation as a process for ISDS by ICSID or in BIT. The International Chamber of Commerce, in 2014 replaced its rules for arbitration with Mediation Rules, which reflected the prominent role of mediation in international dispute resolution.[54] Additionally, other prominent institutions such as World Bank and International Finance Corporation are playing a major role in the promotion of mediation as a process in resolving international commercial disputes[55]. There is hope for effective mediation when it comes to ISDS in future which will promote mutually beneficial long-term relations, stability, and prosperous economic health.[56]

---

[50] Iram Majid "Crain Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India: A rising and burning need for investor-State mediation in investor-State tax and energy-related disputes' [2021] SCC OnLine Blog Available at https://www.scconline.com/blog/post/2021/03/08/cairn-energy-plc-and-cairn-uk-holdings-limited-cuhl-v-government-of-india-a-rising-and-burning-need-for-investor-state-mediation-in-investor-state-tax-and-energy-related-disputes/ accessed 20 May 2021

[51] Carrie Menkel-Meadow, Lela Porter Love, *Mediation: Practice, Policy and Ethics* (3rd edn Wolters Kluwer Law & Business 2020)

[52] 'Mediation of investor-State conflicts' [2014] Harvard Law Review Available at https://www.jstor.org/stable/23742045 accessed 24 May 2021

[53] *Supra* note 20

[54] ICC, ICC MEDIATION RULES (2013)

[55] Welsh, Nancy and Schneider, Andrea Kupfer 'The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration' (2013) HNLR 23.

[56] Cyril Chern, *International Commercial Mediation* (Informa Law from Routledge 2008)

Conclusion

India has challenged the award by the PCA in the Cairn Energy Plc. decision, citing the usage of sovereignty and the company's tax dodging. The government is seeking a peaceful resolution within the country's legal system and is disputing the arbitration tribunal's ruling, claiming that the claims are "based on an abusive tax avoidance plan that was a grave violation" of Indian tax rules. As per the statement released by the Finance Ministry, the award incorrectly ratifies Cairn's Double Non-Taxation strategy, which was aimed to avoid paying taxes anywhere in the globe, a crucial public policy concern for governments of various countries.

The consensus has been that there is a striking need for clarity in the meaning and scope of investment, investment treaties, and the terms used under these treaties. As per the discourse of the paper, the FET standard, and the regulatory discretion of the host state exercised to perform its sovereign functions are areas of struggle that need to be addressed immediately. While implementing any steps that may have an impact on foreign investors, the government must bear the commitments under the BIT in mind.

Due to the wide and ambiguous meaning assigned to the 'fairness and equitable' clause, the updated BIT has eliminated the same. Instead, it has included protections against a limited set of instances as mentioned in the treaty. The "pro-state" BIT also gives increased regulatory power to the host state which raises the concern for India's protection. Searching for a band-aid for these issues is sine qua non in bolstering the investment landscape of the country.

Before taking any action that may damage foreign investors, more coordination between the Ministry of Finance and all other ministries is required to consider India's obligations under the BIT. India yearns to be an investor-friendly jurisdiction, and whether it will be able to achieve this goal will be determined by the progress made by the government in its legislative framework. The Ease of Doing Business will advance from an overall improvement in the arbitration environment resulting in higher FDI. The role of publication of relevant arbitral documents, interpretative guidance in the treaty and adoption of a settlement through mediation processes cannot be undermined while tackling the areas of struggle arising out of BIT for India.